IN THE

Supreme Court of the United States

October Term, 1977

No. 77-491

MORRIS B. MYERS

Petitioner,

v.

JOSEPH M. BUTLER AND ELLSWORTH E. EVANS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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JOSEPH M. BUTLER AND ELLSWORTH E. EVANS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered on May 2, 1977, in Appeal No. 76-1903 entitled Morris B. Myers, plaintiff, v. Joseph M. Butler and Ellsworth E. Evans, defendants.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 556 F. 2d 398 and is reprinted at Appendix A. The judgment of the United States District Court for the District of South Dakota is reprinted at Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit (Appendix A) is dated and was entered May 2, 1977. Application for rehearing was denied by order dated and entered June 28, 1977 (Appendix C).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. In this legal malpractice case, in which petitioner claims respondents were negligent in failing to assert in defense of an embezzlement prosecution in a motion for directed verdict at the close of the state's case-in-chief, that the money claimed embezzled was loaned to petitioner, the court of appeals affirmed the judgment of the district court granting respondents' motion for directed verdict; it did so without reference to the facts and the evidence, and without citation of authority. It thus decided an important state question in conflict with applicable state law, and has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the trial court as to call for an exercise of the Court's power of supervision.

The principle question for review is whether the court of appeals properly reached the conclusion that

> "Contrary to the appellant's (petitioner) contention that appellees never raised the loan issue, the Supreme Court of South Dakota was presented with the issue of the sufficiency of the evidence to support a conviction of embezzlement. The court noted that it was for the jury to resolve the factual disputes and that the jury had obviously rejected appellant's version.

> "The Court has carefully reviewed the record and is left with the definite conclusion that appellees acted competently and ably at appellant's trial. The record fails to support allegation that appellees did not raise all feasible issues on appellant's behalf." (Appendix A)

2. In a second count petitioner asserted a breach of warranty claim against respondents based upon the failure of a promised result in a plea bargaining situation to materialize. The claim was introduced not only for its substantive worth but so that petitioner's claim for damages for incarceration would not be diminished by the sentence to confinement ordered in the abortive plea bargain proceedings to be served concurrently with the sentence on the embezzlement conviction. The court of appeals held the claim to be without merit.

Question presented: Where, in judicial "plea bargain" proceedings, counsel for the accused has promised or warranted a particular result, and in reliance thereon and to satisfy purely formal requirements, the accused participates with court and counsel in the ritual's litany, is the accused thereafter estopped to claim damages for the unfulfilled promise?

Of course a resolution of this issue centers upon the Court's willingness at reproof. The Court has officially smiled on the judicial lie of the plea bargain and much has been written on the subject (e.g., Ann Strick, *Injustice for All*, G. P. Putnam's Sons, New York, 1977; excerpt at Appendix D). Argument and authority on this question will not be forthcoming in this petition; but no abandonment of the question should be inferred from such omission.

STATUTES AND REGULATIONS INVOLVED

In pertinent part, the following statutes and regulations are involved in this petition:

31 C.F.R. 315.5:

> • • • No designation of an attorney, agent, or other representative to request or receive payment on behalf of the owner or a coowner, nor any restriction on the right of the owner or a coowner to receive payment of the bond or interest, • • • may be made in the registration or otherwise • • •.

31 C.F.R. 315.7:

> Authorized Forms of Registration. — (a) Natural persons. — • • •(3) Beneficiary form — two persons (only). Examples: John A. Jones 123-45-6789 payable on death or Mrs. Ella S. Jones.

31 C.F.R. 315.15:

> • • • Savings bonds are not transferable and are payable only to the owners named thereon, • • •. A savings bond may not be hypothecated, pledged as collateral, or used as security for the performance of an obligation, • • •.

31 C.F.R. 315.35:

> • • • Payment of a savings bond will be made to the person or persons entitled thereto under the provisions of these regulations upon presentation and surrender of the bond with an appropriate request for payment, • • •. Payment will be made without regard to any notice of adverse claims to a bond and no stoppage or caveat against payment in accordance with the registration will be entered.

31 C.F.R. 315.36:

> • • • (e) • • • An owner who has presented and surrendered a savings bond • • • for payment, with

> an appropriate request for payment, may withdraw such request if notice of intent to withdraw is given to and received by the same agency to which the bond was presented prior to the issuance of a check in payment of the Treasury Department or a Federal Reserve Bank, • • •.

31 C.F.R. 315:38:

> • • • A request for payment of a bond must be executed on the form appearing on the back of the bond • • •. • • • adding in the space provided the address to which the check issued in payment is to be mailed. • • • No request signed in behalf of the owner or person entitled to payment by an agent or a person acting under a power of attorney will be recognized by the Treasury Department, • • •. (d) • • • — After the request for payment has been signed by the owner, the certifying officer should complete and sign the certificate following the request as provided in Sec. 315.39(a).

31 C.F.R. 315.39(a):

> • • •, after the request for payment has been duly signed by the owner and certified the bond should be presented and surrendered to (1) a Federal Reserve Bank or Branch, • • •. Payment will be made by check drawn to the order of the registered owner • • • and mailed to the address given in the request for payment.

31 C.F.R. 360.1:

> • • • The regulations • • • prescribe the requirements for endorsement, and the conditions for payment, of checks, drawn on the Treasurer of the United States.

31 C.F.R. 360.4:

> • • • The presenting bank and the indorsers of a check presented to the Treasurer for payment are

deemed to guarantee to the Treasurer that all prior indorsments are genuine, whether or not an express guaranty is placed on the check. When the first indorsement has been made by one other than the payee personally, the presenting bank and the indorsers are deemed to guarantee to the Treasurer, in addition to other warranties, that the person who so indorsed had qualified capacity and authority to indorse the check in behalf of the payee.

31 C.F.R. 360.5:

• • • The Treasurer shall have the right to demand refund from the presenting bank of the amount of a paid check if after payment the check is found to bear a forged or unauthorized indorsement, • • •.

31 C.F.R. 360.8:

• • •(a) General requirements. — Checks shall be indorsed by the payee or payees named, or by another on behalf of such payee or payees as set forth in this part. The forms of indorsement shall conform to those recognized by general principles of law and commercial usage for the negotiation, transfer, or collection of negotiable instruments. (b) • • • When a check is credited by a bank to the payee's account under his authorization, the bank may use an indorsement substantially as follows: "Credit to the account of the within-named payee in accordance with payee's or payees' instructions, Absence of indorsement guaranteed, XYZ Bank." A bank using this form of indorsement shall be deemed to guarantee to all subsequent indorsers and to the Treasurer that it is acting as an attorney in fact for the payee or payees, under his or their, authorization. • • •

31 C.F.R. 360.12:

• • • Any check may be negotiated under a specific power of attorney executed after the issuance of the check and describing it in full. • • • checks • • •

may be negotiated under a special power of attorney (i) naming a banking institution or trust company as attorney in fact, (ii) limited to a period not exceeding twelve months, and (iii) reciting that it is not given to carry into effect an assignment of the right to receive payment, either to the attorney in fact or to any other person.

South Dakota Compiled Laws:

SDCL Ann. 22-38-3:

If any person being a trustee, banker, merchant, broker, attorney, agent, assignee in trust, executor, administrator, or collector, or being otherwise entrusted with or having in his control property for the use of any other person or persons or for any public or benevolent purpose, fraudulently appropriates it to any use or purpose not in the due and lawful execution of his trust, or secretes it with the fraudulent intent to appropriate it to such use or purpose, he is guilty of embezzlement.

SDCL 23-45-5:

At any time after the evidence on either side is closed, the court may, upon motion of the defendant, direct the jury to return a verdict of acquittal, and in the event of the failure of the jury to return such a verdict of acquittal the court may refuse to receive any other verdict and may discharge the jury and enter a judgment of acquittal.

SDCL 43-37-2:

If the borrower agrees to return at a future time a similar thing instead of the identical thing borrowed, the loan is a loan for exchange.

SDCL 23-37-9:

A loan for exchange transfers title to the thing and the borrower is entitled to all its increases during the loan period.

STATEMENT OF THE CASE

Introduction

This is a legal malpractice case. A claim of petitioner in the case is the failure of the respondents to assert a defense in criminal proceedings brought against petitioner by the State of South Dakota that would have required petitioner's acquittal. The present litigation is an example of the often criticized calibre of defense lawyer in this country and thus warrants the attention of this Court to provide incentive for improvement through the sanction of the civil remedy for damages.

Without reference to the facts or evidence, and without citation of authority, the Court of Appeals affirmed the judgment of the District Court of South Dakota granting respondents' motion for directed verdict. Petitioner contends the opinion and judgment were rendered not because of the legal principles or facts involved, these were simply ignored, but because it had determined not to emphasize the inadequacies of the criminal defense Bar and to protect two of its members from damage claims and other consequences of their incompetence.

Technical Facts

On January 8, 1970, the Farmers and Merchants Bank, of Aberdeen, South Dakota, loaned petitioner $4035.60 for which petitioner gave his unsecured promissory note due in thirty days (Appendix E). The proceeds of the loan and note were credited to petitioner's personal checking account the following day and were thereafter drawn out and spent by petitioner for his own purposes. On September 11, 1972, an indictment was returned in Brown County, South Dakota, charging petitioner with the crime of embezzlement under SDCL 22-38-3 as follows (omitting formal parts):

> "That Morris B. Myers, on or about the 9th day of January, 1970, in Brown County, South Dakota, while being an attorney duly licensed to practice law in South Dakota, had under his control certain property for the use of another person, to wit: cash in excess of $50.00, said property being entrusted to him by Jeannette Zick, and he did then and there fraudulently appropriate said property to a use or purpose not in the due and lawful execution of his trust contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State of South Dakota."

Petitioner retained respondents to defend him by payment to them of $20,000 cash. Trial to a jury resulted in a conviction. At the trial the state's contention was that petitioner embezzled the money loaned to him by the Farmers and Merchants Bank on January 8, 1970. Even so, the respondents did not move for a directed verdict at the close of the state's case-in-chief and assert the loan defense. Petitioner's sentence of two years confinement in the state penitentiary was affirmed on appeal (Appendix F). This action, with jurisdiction based on diversity of citizenship, 28 U.S.C. § 1332, followed in the United States District Court, District of South Dakota. One of the allegations of negligence in the amended complaint is that:

> "* * * at the close of the state's case-in-chief * * * defendants (respondents) failed to move the court for a directed verdict on the grounds that the money claimed to have been embezzled by plaintiff (petitioner) was in fact and law loaned or advanced to plaintiff by the Farmers and Merchants Bank of Aberdeen, South Dakota, and belonged to plaintiff * * *."

At the embezzlement trial these additional facts were elicited by the state in its case-in-chief. On January 8, 1970, petitioner was a practicing attorney at Aberdeen,

South Dakota. On that day, a client, Jeanette Zick (sometimes Jeanette Dennert), signed the requests for payment on each of eight Series "E" U.S. Savings Bonds registered to Herman Weismantel, payable on death to Jeanette Zick, and handed them to petitioner with instructions that they be surrendered for redemption (Herman Weismantel was the grandfather of Jeanette Zick; he died in 1963). Later that day petitioner delivered the bonds to Dennis Christensen, vice-president of the Farmers and Merchants Bank, who, at petitioner's request, guaranteed the signature on each of the bonds. On January 9, 1970, Mr. Christensen forwarded the bonds to the Federal Reserve Bank in Minneapolis for redemption. On January 15, 1970, in consideration of the redemption, the Federal Reserve Bank issued U.S. Treasury check to Jeanette Zick for $4035.60 and mailed it to her in care of the Farmers and Merchants Bank. Jeanette Zick never received the check; it was intercepted by the Farmers and Merchants Bank on January 16, 1970, and on that day was endorsed by the bank

> "Credited to the account of the within named payee in accordance with payee's instructions. Absence of endorsement guaranteed. The Farmers and Merchants Bank, Aberdeen, SD.".

Jeanette Zick did not authorize the endorsement; she did not maintain an account with the bank and had not designated it as her attorney-in-fact to negotiate U.S. Treasury checks. The bank presented the check for payment and in due course received from the Federal Reserve Bank an amount equal to that for which the check was issued.

At the embezzlement trial, in their motion for directed verdict made at the close of all the evidence, their requests to charge, and their objections and exceptions to the court's instructions, respondents did not raise or assert the loan

defense. Significantly, the court did not instruct the jury that if it found the money claimed to have been embezzled by petitioner was loaned to him then it should acquit, nor did respondents request the court to so instruct the jury. Moreover, "loan" or "borrow" is nowhere mentioned in the respondents' requests to charge or in the court's instructions. In the appeal that followed respondents further failed to assign error upon, or brief, the loan defense issue.

Petitioner sought post-conviction relief in state court and a writ of habeas corpus in federal court. In each the principle ground urged was that petitioner was denied due process and equal protection in that there was no evidence to support the conviction. The state court refused relief on the ground that the loan defense had been submitted and decided. Petitioner's application for certificate of probable cause to appeal was for the same reason denied. At the time of filing the application for writ of habeas corpus petitioner's sentence had been commuted; he was therefore not "in custody" and the application was denied.

REASONS FOR GRANTING THE WRIT

A FAIR READING OF THE RECORD COMPELS THE CONCLUSION THAT PETITIONER HAS BEEN DENIED DUE PROCESS OF LAW.

No identification is possible between what the record discloses and what the court of appeals opinion conveys. Facts and law are arbitrarily ignored, and, in error, the court of appeals devised its opinion. The error is gross and obvious, an arbitrary action of the court of appeals resulting in a deprivation of petitioner's property without due process of law (Roberts v. New York, 295 U.S. 264, 79 L. ed. 1429, 55 S. Ct. 689).

Although the court of appeals did not explain the basis of its disposition, reasonable men cannot differ on a record such as was made here. The case, postured as in this petition, i.e., limited to the claim of negligence based upon respondents' failure to raise the loan defense in a motion for directed verdict of acquittal at the close of the state's case-in-chief, no factual disputes exist for resolve by the jury and the motion would have been granted as presenting only a question of law. The evidence introduced by the state in its case-in-chief (Appendix "E") is undisputed and subject to no differing versions for resolve by the jury. The character of the money for purposes of determining the criminality of petitioner's actions with respect thereto, was transfixed; it was loaned to petitioner, was owned by him (SDCL §§ 43-36-2 and 43-37-9) and could not be embezzled by him. (*State v. Kari* (Mont., 1915), 149 P. 956; *Foster v. State* (Ohio, 1930), 175 NE 713; *Commonwealth v. Mithneck* (Pa., 1938), 198 A. 463; *Pearl Assurance Co. v. National Insurance Agency* (Pa., 1943), 30 A2d 333; and *Commonwealth v. Bixler* (Pa., 1922), 79 Pa. Super. 295). The character of the thing claimed embezzled is a question of law, *U. S. v. Collins* (CCA 9th), 464 F2d 1163.

Petitioner's only effective remedy for violation of his right to due process is to seek review by this Court.

CONCLUSION

This case presents an instance of total and arbitrary deference by a court of appeals to the interests of two members of its Bar, the respondents. In the disposition here complained of, no consideration was given to the interests of dispensing justice and the attainment of sound decisions on the merits. At no stage in the proceedings in which petitioner was represented by respondents was

the loan defense tendered to or considered by the court. This absolute void notwithstanding, the court of appeals held that respondents raised all feasible issues on petitioner's behalf even though the record is clear that they did not assert the loan defense which would have resulted in petitioner's acquittal. The case should be remanded for trial to a jury on the issues as framed by the pleadings.

Respectfully submitted,

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APPENDIX

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 76-1903

MORRIS B. MYERS,

Appellant,

v.

JOSEPH M. BUTLER AND
ELLSWORTH E. EVANS,

Appellees.

Appeal from the United States District Court for the District of South Dakota.

Submitted: April 12, 1977
Filed: May 2, 1977

Before LAY and HENLEY, Circuit Judges, and NANGLE, District Judge*

PER CURIAM.

Morris B. Myers appeals from a final judgment entered pursuant to a directed verdict granted at the close of appellant's case. Appellant had brought suit, with jurisdiction based on diversity of citizenship, 28 U.S.C. § 1332, alleging professional negligence and breach of warranty on the part of appellees. These claims were based on appellees' representation of appellant in state criminal proceedings.

Appellant, who had been an attorney, was charged by indictment in 1972 with the crime of embezzlement; ap-

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*JOHN F. NANGLE, District Judge, Eastern District of Missouri, sitting by designation.

pellant was also charged by information with the misdemeanor of transferring property to defraud creditors. Appellant was convicted of the embezzlement charge, following a jury trial. This conviction was appealed and upheld. *State v. Myers,* 220 N.W.2d 535 (S.D. 1974). Post-conviction relief was denied. Appellant thereafter pleaded guilty to the charge of transferring property to defraud creditors. Appellant contends that appellees were negligent in that they failed to properly present at the trial and appellate levels the defense that the money which appellant allegedly embezzled was, in fact, a loan to him and, accordingly, could not sustain a charge of embezzlement.

In connection with the alleged breach of warranty, appellant contends that appellees warranted that appellant would not receive a term of imprisonment if he pleaded guilty to the charge of transferring property to defraud creditors. Appellant, however, was sentenced to one year imprisonment, said sentence to run concurrently with the sentence received pursuant to the embezzlement conviction.

The facts underlying the embezzlement charge are set out fully in *State v. Myers, supra* at 537-38. Contrary to the appellant's contention that appellees never raised the loan issue, the Supreme Court of South Dakota was presented with the issue of the sufficiency of evidence to support a conviction of embezzlement. The court noted that it was for the jury to resolve the factual disputes and that the jury had obviously rejected appellant's version.

The Court has carefully reviewed the record and is left with the definite conclusion that appellees acted competently and ably at appellant's trial. The record fails to support any allegation that appellees did not raise all feasible issues on appellant's behalf.

Appellant's claim that appellees warranted that there would be no term of imprisonment were appellant to plead guilty to the charge of transferring property to defraud creditors is totally belied by the record. At the time of the guilty plea, appellant was carefully questioned by the trial court and the following exchange took place:

> Q: [by court]: Now do you understand that no one can make any promises for the court as to how I will dispose of this case in the event either that you are found guilty by a jury or in the event that you plead guilty. Do you understand this?
>
> A: [by appellant]: I do, your honor.
>
> • • •
>
> Q: Has anyone promised you that I, as judge, will be easy on you?
>
> A: No, your honor.
>
> • • •
>
> Q: Have any promises or threats been made to induce you to plead guilty?
>
> A: Only my lawyers advise me, your honor, that in the event of this plea that a recommendation would be made by the attorney general's office by the state that in the event of a sentence it would be suspended — that would be the recommendation of the state.
>
> Q: You understand that that recommendation by the state is in no way binding upon the court?
>
> A: I understand that, your honor.
>
> • • •
>
> Q: Do you realize that as of now this court does not know how I will dispose of this case in the event that you plead guilty? Do you understand that?
>
> A: I do, your honor.

Appellant's own statements before the trial court establish that the claim of breach of warranty is totally without merit. Appellant has argued, however, that his responses above were false and that he was told to so lie in order that the guilty plea be accepted and the promised sentence rendered. If this were true, appellant would still not be able to prevail. *Cf., Kansas City Operating Corporation v. Durwood*, 278 F.2d 354, 357 (8th Cir. 1960) ("* * * anyone who engages in a fraudulent scheme forfeits all right to protection, either at law or in equity."); 74 Am.Jur.2d Torts § 46.

Appellant has failed to adduce sufficient evidence to prove a prima facie case on either claim. Accordingly, the judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX "B"

Filed August 11, 1976

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

Civil No. 75-5076

MORRIS B. MYERS,

Plaintiff,

vs.

JOSEPH M. BUTLER AND
ELLSWORTH E. EVANS,

Defendants.

JUDGMENT

The above entitled action came on for trial before the Court and a jury, and the plaintiff having rested, the defendants moved the Court for a directed verdict in favor of the defendants and against the plaintiff.

The motion is granted.

IT IS ORDERED AND ADJUDGED that the plaintiff take nothing by this action, that the action be and it is hereby dismissed on the merits, and that the defendants, Joseph M. Butler and Ellsworth E. Evans, recover of the plaintiff, Morris B. Myers, their costs in this action to be fixed and assessed by the Clerk of this Court.

Dated at Rapid City, South Dakota, this 11th day of August, A.D. 1976.

RONALD N. DAVIES
Senior United States District Judge
(Sitting by Designation)

ATTEST:
WILLIAM J. SRSTKA, Clerk
By JANET M. HANSEN, Deputy

APPENDIX "C"

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1976

No. 76-1903

MORRIS B. MYERS,

Appellant,

vs.

JOSEPH M. BUTLER, ET AL.,

Appellees.

Appeal from the United States District Court for the District of South Dakota

---

Petition of appellant for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

June 28, 1977

APPENDIX "D"

PLEA BARGAINING

Of all those adversary practices the state may summon, one of the most disreputable is perhaps that "combination of duress and trickery" known officially as plea bargaining, and unofficially as "copping a plea." Plea bargaining is held necessary to speed the backlog jamming our courts. Without it, "the courts couldn't function for a day." (A Superior Court judge comments, "The trial courts are obsessed with backlog. You never see much about justice.") Indeed, the plea bargaining concludes over 90 percent of criminal cases in the United States, but *without that trial* our Constitution supposedly guarantees.

In plea bargaining, the prosecutor may multiply charges by breaking up what is essentially a single accusation into numerous parts, and charging each as a separate offense. Or he may add conspiracy counts. Or he may overcharge: perhaps charging felony (entailing sentences from a year to life) when only a misdemeanor (with maximum sentences of less than a year) would actually hold up in court. The defendant, overwhelmed by the mushroomed threat against him, is (even if innocent) thereby coerced into settling as follows: If he will forgo his right to trial by pleading guilty to one charge of the many, or to the lesser misdemeanor — the prosecutor will drop the rest.

Once such bargain is privately struck between the attorneys, usually with the Court's collusion, the accused, his lawyer, and the prosecutor stand before the Bench. (In the federal courts, the promise which has elicited the plea must be on the public record.) Here the three truth seekers join in requiring from the defendant some variation upon the following well-rehearsed litany:

> **PROSECUTOR: "Have you received your attorney's advice in this matter?"**

ACCUSED: "Yes."

PROSECUTOR: "Do you understand that you have a right to trial by jury?"

ACCUSED: "Yes."

PROSECUTOR: "Do you understand you have a right to take the stand in your own defense?"

ACCUSED: "Yes."

PROSECUTOR: "Do you understand you have a right to cross-examine witnesses against you?"

ACCUSED: "Yes."

PROSECUTOR: "Do you voluntarily give up all these rights?"

ACCUSED: "Yes."

PROSECUTOR: "Do you understand that you have a right against self-incrimination, and that by pleading guilty you are incriminating yourself?"

ACCUSED: "Yes."

PROSECUTOR: "Has anyone made any promises to you, to induce you to make this plea?"

ACCUSED: "No."

PROSECUTOR: "Has anyone threatened you or anyone near and dear to you to make this guilty plea?"

ACCUSED: "No."

PROSECUTOR: "Are you entering this plea freely and voluntarily?"

ACCUSED: "Yes."

PROSECUTOR: "With no promises made to you?"

ACCUSED: "Yes."

PROSECUTOR: "Did you in fact do this act with which you are charged?"

ACCUSED: "Yes."

PROSECUTOR: "How do you now plead?"

ACCUSED: "Guilty."

Under the thumbscrews of the Inquisition, such result was called voluntary confession. It still is.

Nonetheless, with this obligatory recital before an augustly approving Bench and a busily recording court reporter (so that everything is clear and above board and absolutely unappealable) the case is concluded. Practically everyone is happy. The state has saved itself money. The defense attorney has been paid for doing nothing. The prosecutor has spared himself the work of putting a case together — plus the risk of losing if it went to trial. Police departments and mayors' offices add one more statistic to their swelling conviction graphs. The guilty come out ahead.

Only the innocent lose — together with all the rest of us. For under plea bargaining, the innocent always receive punishment without warrant, while the guilty receive less than the law, applied, would require. Even the most vicious killer may, through that means, return to our streets in less than four years. In California recently, a first-degree murderer plea-bargained his way into an even softer sentence. The killer admitted to firing seven bullets into his victim's head and stuffing the body into a car trunk. He was eligible for parole within six months.

As the plea bargaining serves the violent criminal well, equally well does it serve the influential civil criminal, to whom it may grant a stunning leniency. It was so used

with bargain-basement abandon in the Watergate prosecutions. There those entrusted with law and order at the highest level got off —at worst — with lighter sentences than an auto thief might expect. Former United States Attorney Richard G. Kleindienst, for example, who admitted to having been "less than candid" under oath to Congress, was charged not with perjury but with a misdemeanor. He received (together with judicial praise for the "too loyal heart" which had prompted his lie) one month in jail plus a $100 fine — both suspended.

APPENDIX "E"

(Excerpted from transcript of testimony of Dennis Christensen, Vice-President, Farmers and Merchants Bank, Aberdeen, South Dakota, witness for the state in its case in chief; and Trial Exhibit 2)

Transcript, page 53, lines 17-25; Transcript, page 54, lines 1-8:

Q. • • • You indicated that he had signed a promissory note?

A. That is right.

Q. I show you what has been marked for identification as Exhibit 2, and ask you if you can identify that?

A. This is a promissory note signed by Morris Myers on January 8, 1970.

Q. Is that the copy of the promissory note you are talking about?

A. Yes, it is.

(Exhibit 2 received in evidence.)

Transcript, page 55, lines 14-25; Transcript 56, lines 1-17:

Q. Is that your handwriting on that promissory note, Exhibit 2?

A. Yes, it is.

Q. Did you make out the note at that time in that amount?

A. Yes, I did.

Q. What, if you know, was done with the proceeds of that note?

A. The proceeds of the note were deposited to Mr. Myers' account.

Q. Showing you what has been marked as Exhibit 3, I ask you to take a look at that and tell the court and jury, please, if you can identify that?

A. That is a copy of the bank statement or ledger account, showing deposits and withdrawals on the checking account.

Q. What is a ledger statement for a checking account?

A. It is the bank statement that the customer receives, and which the bank retains a copy of, the original.

Q. It shows the deposits made and the withdrawals against that account?

A. Yes.

Q. With the resulting balance?

A. Yes.

Q. And the ending date on that is January 14, 1970?

A. Yes, it is.

Q. Now the results of that promissory note of $4035.60, does that Exhibit 3 indicate if that was deposited in that account?

A. Yes, it was, on January 9, 1970.

Transcript, page 63, lines 4-13 (cross-examination):

Q. After you had done this, you loaned Mr. Myers $4035.60?

A. Yes.

Q. You had his promissory note for that amount?

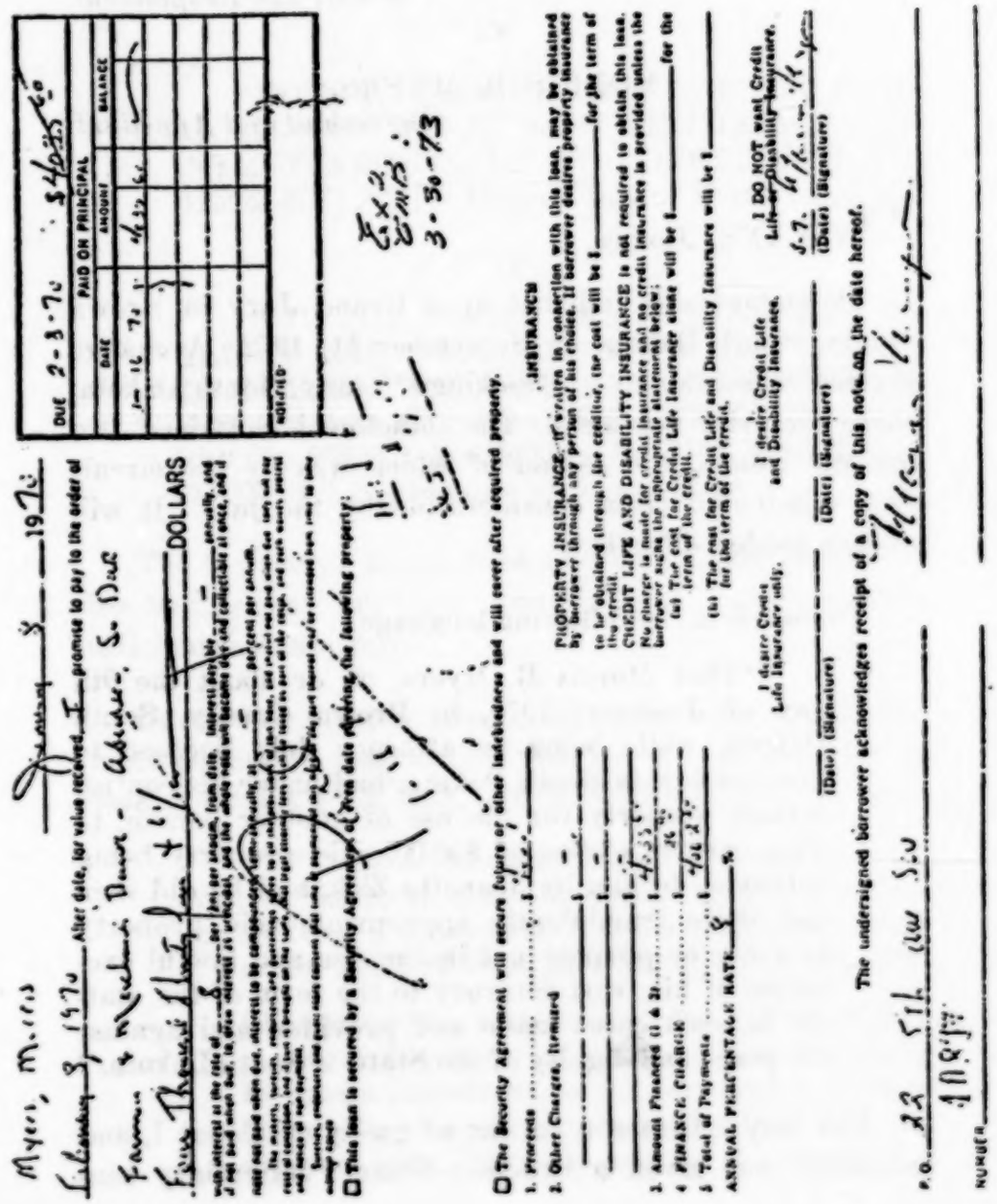
A. Yes.

Q. Legally, if he had died in the next minute, he owed you that much money, didn't he?

A. Yes.

Q. You put the proceeds of that note in Morris Myers' account, is that correct?

A. Yes.



APPENDIX "F"

SUPREME COURT OF SOUTH DAKOTA.

August 2, 1974.

STATE OF SOUTH DAKOTA,
Plaintiff and Respondent,
v.
MORRIS B. MYERS,
Defendant and Appellant.

WINANS, Justice.

Defendant was indicted by a Grand Jury in Brown County, South Dakota on September 11, 1972. A change of venue was granted to Brookings County, South Dakota, where the trial was held. The indictment contained two separate counts, the second of which was by the circuit court eliminated from consideration by the jury. It will not be considered further.

Count I is in the following language:

> "That Morris B. Myers, on or about the 9th day of January, 1970, in Brown County, South Dakota, while being an attorney duly licensed to practice law in South Dakota, had under his control certain property for the use of another person, to wit: cash in excess of $50.00, said property being entrusted to him by Jeanette Zick, and he did then and there fraudulently appropriate said property to a use or purpose not in the due and lawful execution of his trust contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State of South Dakota."

The jury returned a verdict of guilty on Count I, and defendant was given a two-year State Penitentiary sen-

tence by the court. The defendant appeals under numerous assignments of error, but in his brief on appeal eliminates all except two questions which are covered by the assignments as herein numbered.

The defendant presents such questions as follows:

> "I
>
> "DOES THE RECORD SUPPORT THE CONVICTION OF DEFENDANT OF THE ACT AND INTENT NECESSARY TO CONSTITUTE EMBEZZLEMENT? (Assignments of Error I and IV)
>
> "II
>
> "DID THE COURT ERR IN REFUSING TO ALLOW THE DEFENDANT TO TESTIFY AS TO THE REASONS WHY HE BELIEVED HE HAD THE RIGHT TO CASH THE BONDS AND PLACE THE PROCEEDS IN HIS BANK ACCOUNT? (Assignment of Error II)"

The key words in the first question presented for review by this court are "act" and "intent." Is the evidence sufficient in this regard?

Our review must be considered under some well known principles hereto announced by this court. In the case of *State v. Henry,* 1973, S.D., 210 N.W.2d 169, 171, we held:

> "• • • As a reviewing court we must view the evidence in light most favorable to the state on appeal from a conviction. This court held in *State v. Geelan,* 1963, 80 S.D. 135, 120 N.W.2d 533, 536:
>
> > 'Accepting the state's evidence and indulging the most favorable inferences which can fairly be drawn therefrom, as the jury had a right to do, we have no hesitancy in holding that the evidence is sufficient to sustain the verdict.'

The North Dakota Supreme Court has so held in *State v. Moe,* 1967, 151 N.W. 2d 310."

[1] The section defining the embezzlement charged here is covered by SDCL 22-38-3, and whether or not the acts of the defendant were sufficient to come within the purview of that particular section is largely a fact question. Fact issues are peculiarly within the province of the jury. Here there are two different versions of those acts. The State gave its version and the defendant gave his. It appears the jury accepted that given by the State and rejected that by the defendant. This court in *State v. Olson,* 1968, 83 S.D. 493, 161 N.W.2d 858, has held:

> "The facts were for the jury and this court will not disturb the verdict unless the evidence as a matter of law is insufficient to justify the jury finding defendant guilty."

[2, 3] The credibility of witnesses and weighing the evidence is for the jury. *State v. Burtts,* 81 S.D. 150, 132 N.W.2d 209; *State v. Buffalo Chief,* 83 S.D. 131, 155 N.W.2d 914. In the recent case of *State v. Hanson,* 1974, S.D., 215 N.W.2d 130, quoting from an earlier case, we said:

> " 'When the state has introduced evidence upon which, if believed by a jury, they may reasonably find the defendant guilty of the crime charged, the state has made out a prima facie case, and the jury, not the judge, ought to pass upon it.'

The jury heard the evidence as offered by the state and the evidence offered in support of appellant's defense. As indicated above, the trial court permitted wide leeway in letting appellant develop his defense. His defense was also fully covered by the court's instructions. Thus the question of appellant's guilt or innocence was fairly and fully submitted to the jury. It is well established by de-

cisions of this Court that 'The jury are the exclusive judges of the credibility of the witnesses and the weight of the evidence.' "

It would extend this opinion beyond reasonable length to review the evidence fully herein, so we will briefly summarize.

The parties in a divorce action, Mr. and Mrs. Zick, called on Mr. Myers to get the divorce. The husband was to pay for the legal services, and defendant Myers was to get the divorce for Mrs. Zick. Certain United States Savings Bonds, property of Mrs. Zick, registered in the names of Herman Weismantel, P.O.D. Mrs. Jeanette Zick, were discussed. The defendant told Mrs. Zick that the value of the bonds would bring a better rate of interest if they were cashed and invested in something else. Mrs. Zick was requested by defendant to endorse the bonds, which she did. The defendant then took the bonds so endorsed to a local bank for redemption, and the bank sent them in to the Federal Reserve Bank. The defendant on the strength of the bonds and his personal note borrowed from the bank the amount of the redemption value in the sum of $4,035.60 which he deposited in his own personal account. The defendant gave his personal note to the bank. He told the banker that he needed the money that day so that he could give the money to Mrs. Zick because of her financial condition. Defendant asked the banker if he could borrow the money, then when the proceeds were received, to apply "those against the note to pay it off." This is what was done, and when the proceeds of the redeemed bonds were returned to the bank, the note signed by defendant was canceled as paid in full. The bank endorsed the check from the treasurer of the United States with a credit and guaranteed the endorsement. It was not endorsed by Mrs. Zick.

The defense is that when Mrs. Zick came to defendant he went over her papers among which were the bonds. He discussed with her the needs of the family and suggested cashing the bonds and using the proceeds in some investment yielding a high rate of interest. Defendant stated that there was an individual named Roberts who owned a piece of property which he had sold by contract for deed, and that Mr. Roberts also owed defendant money. The contract for deed was paying an 8% return on the balance due along with monthly payments. Defendant claims he informed Mrs. Zick that the contract was a sound investment, and that it would provide monthly payments for her to apply against living expenses and it would increase her income up to a level with her other income, which would support her and her children. Defendant testified that Mrs. Zick and defendant discussed the matter of the difference in the interest rates, and that she would be receiving a two and a half to three percent increase. Mrs. Zick agreed to take it. To accomplish this end defendant drafted a deed to the property from Roberts to Mrs. Zick which was executed by Roberts. Defendant never gave her the deed from Roberts, but he claimed he had informed Mrs. Zick of its existence.

It was Mrs. Zick's testimony that she discharged defendant as her attorney the end of February or first part of March 1970, and it was not until some time in April 1970, and after she had discharged him, when defendant first told her the bonds had been cashed "but he didn't have time to go into what they had been invested in." This was the first time she had been informed they had been cashed. It was not until August 1970 that defendant paid the proceeds of bonds over to her new lawyer, less $617.50 for attorney fees for services rendered by him in the case of Zick v. Zick. The statement dates from December 30, 1969 to March 2, 1970. The remittance from defendant to

Mrs. Zick's new attorney is in the amount of $3,418.10. Mrs. Zick received her divorce through the services of her new attorney.

We have given but the skeletal outline of the claims made in the case. The stories told in court by Mrs. Zick and the defendant were conflicting, and also the banker's testimony was damaging to the defendant. It was for the jury to search out the truth.

The appellant under question I of his appeal has listed as foundation for such question his assignments I and IV. Assignment I is as follows:

> "The Court erred in overruling the objection of the defendant to introduction of any evidence under the indictment for the reason that the indictment failed to state a public offense or charge a violation of any law of the State of South Dakota."

The law which defendant is charged with violating is SDCL 22-38-3, supra, and reads as follows:

> "If any person being a trustee, banker, merchant, broker, attorney, agent, assignee in trust, executor, administrator, or collector, or being otherwise entrusted with or having in his control property for the use of any other person or persons or for any public or benevolent purpose, fraudulently appropriates it to any use or purpose not in the due and lawful execution of his trust, or secretes it with the fraudulent intent to appropriate it to such use or purpose, he is guilty of embezzlement."

At the beginning of the case defendant's attorney made the following objection:

> "Before any testimony is taken, the defendant objects to the introduction of any evidence on the part of the State for the reason and on the grounds that the indictment fails to state a public offense

or charge of violation of any laws of the State of South Dakota, and in fact, I point out to the court that the indictment fails to allege the ownership of the money and fails to allege the name of the person against whom the offense was committed; that being wholly as required by the statute. And for the record, that is SDCL 23-32-5."

SDCL 23-32-5 reads as follows:

"The indictment or information must be direct and certain as it regards:

(1) The party charged;

(2) The offense charged;

(3) The name of the thing or person upon or against who the offense was committed."

[4] The court overruled this objection, and we believe correctly. The indictment stated that the person who had entrusted the money to the defendant was Jeanette Zick, and it sets forth the facts done by defendant upon which he was being charged.

In *State v. Blue Fox Bar, Inc.*, 1964, 80 S.D. 565, 128 N.W.2d 561, 563, we stated the rule to be:

"The test of the sufficiency of an information under these provisions is whether it apprises a defendant with reasonable certainty of the nature of the accusation against him so that he may prepare his defense and plead the judgment as a bar to any subsequent prosecution for the same offense. *State v. Sinnott*, 72 S.D. 100, 30 N.W.2d 455; *State v. Wood*, 77 S.D. 120, 86 N.W.2d 530; *State v. Belt*, 79 S.D. 324, 111 N.W.2d 588."

See also *State v. Henry*, 210 N.W.2d 169, *supra*, at pages 173, 174.

Assignment IV under question I reads as follows:

"The Court erred in denying the defendant's motion for a directed verdict of acquittal for all the reasons stated in the motion for directed verdict of acquittal made at the close of all of the evidence."

[5] The motion made at the close of all the testimony is a long one which we will not set forth at length. We reiterate this, however, the evidence was conflicting. If Mrs. Zick was correct in her testimony, if the banker was correct in his, then the defendant was wrong in certain crucial aspects of his. There was at least a prima facie case made by the state "and the jury, not the judge, ought to pass upon it."

The word "intent" used in question I by appellant is also closely connected with question II heretofore set forth and hereinafter discussed. The court used the word "intent" in a number of his instructions to the jury and then in instruction 9 gave guidance to the jury how "intent" is found in the context of the case. No objection was made, and we believe the instruction expressed the correct law.

[6] Point II or Question II by appellant brings up a ruling by the trial court refusing to allow the defendant to testify why he in good faith believed he had the right to cash the bonds and place the proceeds in his bank account. This defense is specifically authorized by SDCL 22-38-10 which provides as follows:

"Upon any trial for embezzlement it is a sufficient defense that the property was appropriated openly and avowedly and under a claim of title preferred in good faith even though such claim is untenable. But this provision shall not excuse the retention of the property of another to offset or pay a demand held against him."

This assignment is predicated upon the offer of proof which was made by the defendant at the trial. It is predicated on the following questions and answers:

"Q. Mr. Myers, did you believe, when you completed this transaction over at the bank, and the banker put the money in your account, did you believe that you had the right to do that?

A. Yes, I did.

• • • •

would you state why you believed you had the right to do it?

A. I was authorized by Mrs. Zick when she signed the bonds.

Q. Did you continue to believe that you had that right, up to and after you completed the deal?

A. Certainly.

BY MR. BUTLER: Now I would just like to point out to the court that this offer of proof is based on SDCL 22-38-10.

• • • •

BY THE COURT: Well, it seems to me that it is a self-serving statement as to what he believed. The testimony here is that she endorsed the bonds and he received the proceeds which were put into his checking account.

Well, I am going to permit the answer to that first question, that he believed he had a right to put that in his account. That is as far as we will go with it. That is the one that was stricken out."

The jury was returned and the court had the reporter read the first question of the three asked, and the answer to it, to the jury. This limits the error, if any, to questions two and three and their answers.

The contention of defendant is stated as follows:

"The state of mind of the Defendant was clearly a material issue in this case under SDCL 22-38-10. Denying him the right to explain his actions was highly prejudicial. The Court submitted the issue of the Defendant's good faith to the jury in the instructions, but yet denied him the right to state to the jury what his state of mind was and his reasons therefor. This clearly was prejudicial error."

We believe the court was clearly wrong in his denial of the last two questions and the answers. *Warner v. Hopkins,* 42 S.D. 613, 176 N.W. 746; *State v. Holter,* 30 S. D. 353, 138 N.W. 953; Wigmore on Evidence, 3rd Ed., § 581, pp. 714 and 715.

The question we have here, however, is whether the error of the court was prejudicial to the substantial rights of the defendant. SDCL 23-1-2. We hold it is not.

In *State v. Reddington,* 80 S.D. 390, 125 N.W.2d 58, we held:

"There is no definite rule by which to measure prejudicial error and each case must be decided on its own facts."

In a definition of prejudicial error we have said:

"Prejudicial error is such error as in all probability must have produced some effect upon the final result of the trial, namely, the verdict of the jury." *State v. Pirkey,* 24 S.D. 533, 124 N.W. 713.

An examination of the whole testimony of the defendant shows that it is replete with questions and answers of similar content and importance to the defendant's contention. Actually there is nothing in the offer of proof that wasn't fully and completely before the jury by the

evidence of the defendant himself. We hold that the denial of the two questions together with their answers in the offer of proof was simply not prejudicial under the circumstances. It added nothing to his previous testimony and a reversal on this error would be to exalt form over substance. The defendant had a fair trial.

The judgment is affirmed.

DOYLE, J., and RENTTO, Retired Judge, concur.

BIEGELMEIER, C. J., concurs by opinion.

DUNN, J., concurs specially.

RENTTO, Retired Judge, sitting for WOLLMAN, J., disqualified.

BIEGELMEIER, Chief Justice (concurring).

As the last paragraph of the opinion states and the record shows, the two questions called for evidence given by the witness in his prior testimony; consequently, they were repetitious and cumulative, and the court did not err in sustaining the objection to them.*

DUNN, Justice (concurring specially).

I would concur in affirming the decision of the trial court under the facts of this case. I believe, however, that

---

*Some of the evidence of the haste and unorthodox method by which Mrs. Zick lost her "E" bonds shows that she did not sign the "E" bonds in the presence of the Assistant Vice President of the bank or state to him that she did sign them, yet he certified that she "signed the above request in [his] presence." The check in payment of these bonds was made payable to Mrs. Jeanette Zick. The undisputed evidence also shows it was credited to the account of Morris Myers; however, the endorsement states that it was credited to the account of the "payee," Mrs. Zick. The banker did this because he "trusted" defendant, and his representations and urgings of haste were evidence of the defendant's intent to obtain the proceeds of the bonds for his own use.

a word of caution is in order as to the implications of this decision.

The intermingling of a client's funds with his own by an attorney is a serious breach of trust and has always been frowned on by the legal fraternity. I am sure that most attorneys have trust accounts for their clients' funds, but to those few who don't I would state that this charge of embezzlement should be a red alert; a trust account for clients' funds becomes imperative; and, further, personal bills best not be paid out of that trust account. At some place the commingling of client's funds with one's own becomes embezzlement. If personal checks are written by the attorney on an account containing client's funds, this is sufficient to show appropriation under the broad language of SDCL 22-38-3 as interpreted in this decision. This leaves the issue of "fraudulent intent" which generally must be proved by implication from the facts surrounding the case. The circumstances in this case are flagrant enough to leave little doubt that this issue was properly submitted to the jury for resolution. The question left unanswered is — at what stage do the circumstances surrounding the commingly of funds make out a prima facie case of embezzlement for submission to a jury?

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-491

MORRIS B. MYERS,
Petitioner,

v.

JOSEPH M. BUTLER and ELLSWORTH E. EVANS,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statutes

28 U.S.C. § 1652:

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as the rules of decision in civil actions in the courts of the United States, in cases where they apply 8

SDCL § 22-38-3:

If any person being a trustee, banker, merchant, broker, attorney, agent, assignee in trust, executor, administrator, or collector, or being otherwise entrusted with or having in his control property for the use of any other person or persons or for any public or benevolent purpose, fraudulently appropriate it to any use or purpose not in due and lawful execution of his trust, or secretes it with the fraudulent intent to appropriate it to such use or purpose, he is guilty of embezzlement 3, 6, 8, 9, 10, 14

SDCL § 23-52 9

SDCL § 54-8-22:

Every person who, being a party to any conveyance or assignment of any property, or of any interest therein, made or created with intent to defraud prior or subsequent purchasers, or to delay or defraud creditors or other persons, and every person being privy to or knowing of such conveyance, assignment, or charge, who willfully puts the same in use as having been made in good faith, is guilty of a misdemeanor. .4, 41

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IN THE

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PRELIMINARY STATEMENT

The transcript of the trial in U. S. District Court will be designated by the letters "TR". The transcript in the case of State of South Dakota v. Morris B. Myers, trial exhibit No. 2, will be designated by the term "Zick TR". The transcript of the guilty plea entered by petitioner before Judge Hersrud, trial exhibit No. 10, will be designated by the term "Plea TR". The petition for writ of certiorari on file herein shall be designated by the abbreviation "Pet.".

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. "A") is reported at 556 F.2d 398.

JURISDICTION

The judgment of the Court of Appeals was entered May 2, 1977. A petition for rehearing was denied on June 28, 1977. (Pet. App. "C"). The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether respondents' motion for a directed verdict at the close of petitioner's case was properly granted by the United States District Court Judge.

2. Whether a criminal defendant who claims to have knowingly agreed with his counsel to misrepresent facts to a court in connection with the entry of a guilty plea can sue for damages allegedly sustained by reason of the failure to obtain the object of the misrepresentation.

STATEMENT OF THE CASE

This is a professional malpractice suit against respondents arising out of their defense of petitioner, who was charged in state court in South Dakota with a number of criminal offenses. Suit was commenced by the filing of a summons and complaint on November 7, 1975, in the United States District Court for the District of South Dakota, Western Division. Federal jurisdiction was based upon diversity of citizenship. Trial by jury commenced before the Honorable Ronald N. Davies, visiting District Court judge, on August 9, 1976, at Rapid City, South Dakota. A directed verdict in favor of respondents was entered at the close of petitioner's case on August 11, 1976. Petitioner's appeal to the Eighth Circuit Court of Appeals was denied as was his petition for rehearing. The case is now before this court pursuant to petition for writ of certiorari.

Petitioner was admitted to practice law in South Dakota in January of 1957, and engaged in the law practice at Aberdeen, South Dakota, from that date until his disbarment on May 10, 1973. (TR 2) Respondents, Evans and Butler were admitted to practice law in South Dakota in 1928 and 1954, respectively, and are both still actively engaged in practice. (TR 39, 165)

In October, 1972, the grand jury in and for Brown County, South Dakota, returned indictments charging petitioner with nine separate criminal violations (TR 46, 117) The indictments charged petitioner with embezzlement of a client's funds, bribery, receiving stolen property, grand larceny, embezzlement from a decedent's estate and transferring property in fraud of creditors from a bankrupt company. (TR 77, 89, 90, 101, 111-114, 117-124) It was these indictments that respondents were retained to defend by petitioner and two other persons named Wetzler and Gorder, who were also charged in a part of the indictments along with petitioner. (TR 48)

On April 12, 1973, petitioner was found guilty by a jury of embezzlement of the funds of Mrs. Jeanette Zick Dennart in violation of SDCL §22-38-3. (Zick TR 207) A directed verdict of not guilty was entered as to count two of the Zick indictment. (Zick TR 184-196) On May 7, 1973, petitioner was sentenced to two years' imprisonment. Petitioner was tried and acquitted of the bribery charges in May of 1973. On October 23, 1973, petitioner plead guilty to transferring property with

intent to defraud creditors in violation of SDCL §54-8-22. (Plea TR 22) Petitioner was sentenced to serve one year to run concurrently with the prior two year sentence. (Plea TR 31, 32) Pursuant to a plea bargain the remaining charges were dismissed following the entry of the guilty plea. (TR 18)

The embezzlement conviction in the Zick case was affirmed on direct appeal to the Supreme Court of South Dakota, which appeal was prosecuted by respondents. *State v. Myers*, 220 N.W.2d 535 (S.D. 1974). Petitioner served just over five months in prison. (TR 17) Petitioner filed a petition pursuant to SDCL §23-52 seeking post-conviction relief from the Zick conviction in Circuit Court, Third Judicial Circuit, South Dakota. (Appendix "A") The petition was denied after an evidentiary hearing by Circuit Court Judge Cheever. (Appendix "B") Petitioner's petition for probable cause for appeal from Judge Cheever's opinion was denied by Justice Winans of the South Dakota Supreme Court. (Appendix "C") Petitioner has not proceeded through post-conviction proceedings to attempt to set aside the conviction based upon his plea of guilty.

Petitioner's amended complaint upon which this matter was tried set forth two theories for recovery. (Docket Entry No. 22) The first theory, set forth in paragraphs 3-6, is based entirely upon petitioner's allegation that the money claimed to have been embezzled came to him as a loan and therefore he was entitled as a matter of law to a directed verdict of acquittal in the Zick case. (TR 4-6, 8-10, 12, 13, 21, 22, 27, 28, 138-144, 147-149, 181, 182) Throughout the proceedings petitioner contended that the issue relating to the alleged failure to discover and assert the loan defense was a matter of law for the court. (TR 4-6, 12, 13, 21, 22, 27, 28, 138-144, 147-149, 181, 182, Docket Entries Nos. 35, 37) Petitioner's second theory for recovery relates to the guilty plea. Petitioner alleged that respondents warranted that if petitioner, although innocent, would plead guilty to the charge of transferring propery to defraud creditors, he would not be sentenced to prison. (Docket Entry No. 22)

At the close of petitioner's evidence in this case no evidence of negligence on the part of respondents had been presented. Further, no expert testimony had been offered to establish the applicable standard of care to be applied or any deviation therefrom. Respondents' motion for a directed verdict was properly granted and the judgment in their favor properly sustained on appeal.

ARGUMENT

1. Petitioner Contends That if Respondents Had Asserted the Defense in His State Court Embezzlement Trial That the Money Claimed to Have Been Embezzled Came to Him as a Loan, and Thus Could Not Have Been the Subject of Embezzlement, a Directed Verdict of Acquittal Would Have Been Granted as a Matter of Law.

Petitioner contends that respondents failed to discover and present the "loan defense" in the state court proceedings and that said defense would have resulted in acquittal. However, the state court opinions rendered by the South Dakota Supreme Court on direct appeal of the embezzlement conviction and the South Dakota Circuit Court and Supreme Court in post-conviction proceedings clearly reflect that the "loan defense" was asserted by respondents at the original state court trial and on direct appeal to the South Dakota Supreme Court and that the assertion of said defense would not result in acquittal as a matter of law. Thus, petitioner's claims that the Eighth Circuit Court of Appeals decided an issue of state law contrary to the laws of South Dakota and that the Eighth Circuit Court of Appeals' decision so far departed from accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision are totally without merit.

On April 12, 1973, petitioner was found guilty by a jury in Third Judicial Circuit Court, County of Brookings, State of South Dakota, of the crime of embezzlement in violation of SDCL § 22-38-3. SDCL § 22-38-3 provides as follows:

> "If any person being a trustee, banker, merchant, attorney, agent, assignee in trust, executor, administrator, or collector, or being otherwise entrusted with or having in his control property for the use of any other person or persons or for any public or benevolent purpose, fraudulently ap-

> propriates it to any use or purpose not in the due and lawful execution of his trust, or secretes it with the fraudulent intent to appropriate it to such use or purpose, he is guilty of embezzlement."

A portion of the facts supporting the embezzlement conviction are summarized by the South Dakota Supreme Court in its opinion as follows:

> "The parties in a divorce action, Mr. and Mrs. Zick, called on Mr. Myers to get the divorce. The husband was to pay for the legal services, and defendant Myers was to get the divorce for Mrs. Zick. Certain United States Savings Bonds, property of Mrs. Zick, registered in the names of Herman Weismantel, P.O.D. Mrs. Jeannette Zick, were discussed. The defendant told Mrs. Zick that the value of the bonds would bring a better rate of interest if they were cashed and invested in something else. Mrs. Zick was requested by defendant to endorse the bonds which she did. The defendant then took the bonds so endorsed to a local bank for redemption, and the bank sent them in to the Federal Reserve Bank. The defendant on the strength of the bonds and his personal note borrowed from the bank the amount of the redemption value in the sum of $4,035.60 which he deposited in his own personal account. The defendant gave his personal note to the bank. He told the banker that he needed the money that day so that he could give the money to Mrs. Zick because of her financial condition. Defendant asked the banker if he could borrow the money, then when the proceeds were received, to apply "those against the note to pay it off." This is what was done, and when the proceeds of the redeemed bonds were returned to the bank, the note signed by defendant was canceled as paid in full. The bank endorsed the check from the treasurer of the United States with a credit and guaranteed the endorsement. It was not endorsed by Mrs. Zick." *State v. Myers, supra* at 537.

Petitioner claimed at the embezzlement trial that he had purchased for Zick a Contract for Deed paying a suitable rate of return. (Zick TR 103-105, 119, 127) However, the evidence demonstrated that the money in question had been deposited to his personal account and drawn upon almost immediately. (Zick TR 138-140) In fact, without the deposit of the Zick funds, Petitioner's personal account would have been overdrawn substantially. (Zick TR 138-140) The deed for the transfer of the property subject to the Contract for Deed to Zick was not signed until long after withdrawals on the money had been made. (Zick TR 107, 124) The deed was never delivered to Zick nor did she receive any of the income from the contract payments. (Zick TR 134, 135) Indebtedness of the prior owner of the subject property to petitioner was satisfied as a result of the alleged transfer. (Zick TR 102-107, 112) Zick testified that she knew nothing of the cashing of the bonds until several months after they were cashed and that she was never advised of the alleged purchase of the mortgaged property. (Zick TR 14, 16, 17)

Petitioner asserts that because he signed a personal note to obtain the money from the bank the money came to him as a loan and he cannot, as a matter of law, be guilty of violating SDCL § 22-38-3. It is the alleged failure of respondents to ascertain and assert this legal defense that is the basis for petitioner's claims. The issue presented is clearly one of construction of SDCL § 22-38-3, a question of law, and does not involve federal constitutional questions. Therefore, it is respectfully submitted that the decisions of the state courts of South Dakota dealing with the very issue presented in this case are dispositive and controlling on this court. *Walker v. Kruse*, 484 F.2d 802, 805 (7th Cir. 1973); *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), 28 U.S.C. § 1652; *Mullaney v. Wilbur*, 421 U.S. 690, 691 (1975); *Francia v. Rodriquez*, 371 F.2d 827 (10th Cir. 1967).

At the Zick trial a motion for directed verdict was made on behalf of petitioner on the basis that the evidence "fails to show any felonious or unlawful fraudulent appropriation of the money of the complaining witness, Jeanette Zick." (Zick TR 180) In *State v. Myers*, supra, the Souht Dakota Supreme Court was presented with the following question: "Does the record support the conviction of defendant (petitioner) of the act and intent necessary to constitute embezzlement?" This question presented at trial and on review is the identical question posed by the petitioner in this case. The South Dakota Supreme Court held that conviction under SDCL § 22-38-3 was proper. In the case of Morris B. Myers, Petitioner, v. State of South Dakota, Defendant and Respondent, in Circuit Court, Third Judicial Circuit, a post-conviction proceeding under SDCL § 23-52, the exact questions presented in the allegations of petitioner's complaint in the United States District Court were presented to South Dakota Circuit Judge Cheever. (Appendix "A", "B")

Judge Cheever determined that petitioner's claim that as a matter of law he could not have been found guilty because the money came to him as a loan was without merit. The following quotation from Judge Cheever's memorandum opinion is particularly appropriate in this case:

> In connection with Point No. 1 of the petition herein, basically it is the Petitioner's contention therein that the conviction was obtained without relevant evidence that the money involved came into his possession by virtue of an attorney-client relationship or that he converted or misappropriated the money. It is his contention that under the circumstances presented that the money came into his possession, not as an attorney, but as a borrower from the bank and that the Petitioner became a debtor of the bank and could not be guilty of embezzlement of money that belonged to him.

In the appeal in this case, a report of which can be found in 220 N.W.2d 535, one of the assignments of error raised by the Defendant-Petitioner in that case was the following:

'Does the record support the conviction of the Defendant of the act and intent necessary to constitute embezzlement?' In connection therewith, the court, at page 537, made the following statement:

> 'The section defining the embezzlement charged here is covered by SDCL 22-38-3, and whether or not the acts of the Defendant were sufficient to come within the purview of that particular section is largely a fact question. Fact issues are peculiarly within the province of the jury where there were two different versions of those acts. The State gave its version and the defendant gave his. It appears that the jury accepted that given by the state and rejected that given by the defendant.'

In post-conviction proceedings, the Petitioner has developed no new factual situation but has suggested in his brief that as a matter of law he could not be held to be guilty of embezzlement under the facts given and testified to at trial, even accepting the State's version . . . . The Court fails to see where Petitioner has raised anything except an issue of law which was developed both at the trial and on review by the Supreme Court . . . . It is therefore, the Court's opinion that the Defendant has failed to sustain the burden on Point No. 1 of his petition." (Emphasis supplied.) (Appendix "B")

The facts in the Zick case do support a finding by the jury that the proceeds of the bonds came into petitioner's hands for the use of Mrs. Zick and were fraudulently appropriated by petitioner to a purpose not in the execution of his trust. In the Zick case petitioner was not given a loan, but obtained the

money on the basis of Mrs. Zick's bonds and for use on her behalf only. In any event, the question of construction of the particular embezzlement statute involved is one for the state courts of South Dakota.

A final basis upholding the directed verdict with reference to petitioner's claim based on the Zick case is that even assuming that the "loan defense" was not presented, the failure to present a defense in a criminal action that as a matter of law could not have prevailed cannot be said to constitute malpractice. *Martin v. Hall,* 20 Cal.App.3d 414, 97 Cal. Rptr. 730, 733-735, 53 ALR3d 719 (Cal. 1971).

2. **Petitioner Contends Without Supporting Authority or Argument That an Accused Who Has Affirmatively Misrepresented Facts to the Court Accepting His Plea Regarding His Guilt and the Nature and Extent of Promises or Inducements Made to Secure Entry of the Plea Is Entitled to Sue for Damages Allegedly Sustained by Reason of the Failure to Obtain the Object of the Misrepresentation Made.**

On October 23, 1973, petitioner plead guilty to conveyance of property to defraud creditors in violation of *SDCL §54-8-22.* The guilty plea was entered before Circuit Judge Hersrud. A one-year sentence was imposed by Judge Hersrud and directed to run concurrently with the prior two-year sentence entered on the embezzlement conviction. (Plea TR 31, 32) Petitioner alleges in paragraph 7 of his second amended complaint that respondents warranted that no prison term would be imposed if a guilty plea were entered although they knew he was not in fact guilty of the crime charged. (Docket Entry No. 22) The detailed record made by Judge Hersrud at the time of the entry of the guilty plea, a part of which is quoted in the opinion of the Eighth Circuit Court of Appeals, demonstrates conclusively that said allegation is totally without merit.

Petitioner is a law school graduate and practiced law in Aberdeen, South Dakota, from 1957 through 1972. That petitioner was fully advised and fully aware of his rights at the time of the entry of the guilty plea in question is clearly demonstrated by the transcript of the plea. In addition, in petitioner's partial answers to respondents' interrogatories in this action, petitioner provided the following answer to the following question:

> Question 30(g): State whether you understood at the time of the entry of your plea of guilty the legal consequences thereof insofar as said plea constitutes a waiver of right to trial and the constitutional safeguards attendant thereto.
>
> Answer: I did so understand. (Docket Entry No. 18)

Petitioner was fully aware of his rights and has expressly advised and acknowledged that he realized that the recommendation of probation by the state was not binding on the trial court. In the face of the record made at the time of the plea it stretches all reasonable bounds of credibility for petitioner to contend that he was not aware that Judge Hersrud had the power to disregard the plea bargain and impose a prison term.

Petitioner repeatedly denied before Judge Hersrud that any promises had been made to him as to what the sentence imposed would be. Petitioner's allegation in paragraph 7 of his complaint requires that the court find that petitioner knowingly and intentionally misrepresented facts to Judge Hersrud before it can be considered as a basis for relief. Indeed, in answer to respondents' Interrogatory No. 30(h), petitioner answered as follows:

> "Prior to the sentencing Butler and I conferred concerning the manner of proceeding, it was agreed by both of us that in view of the rule requiring the court to make a factual determination I could not tell the truth because

> there had not been a transfer to defraud creditors and that questions from the court regarding intent could not be answered truthfully; it was also agreed between us that I would have to falsely deny the existence of a deal." (Docket Entry No. 18)

A holding that one who claims to have willfully and knowingly misrepresented facts to a court can seek damages because the object of the misrepresentations was not obtained would clearly be contrary to law and public policy. 74 Am.Jur.2d Torts §46. That "anyone who engages in a fraudulent scheme forfeits all right to protection either at law or at equity" is clearly the law of the Eighth Circuit. *Kansas City Operating Corporation v. Durwood*, 278 F.2d 354, 356 (8th Cir. 1960).

3. No "Special and Important Reasons" for Granting a Writ of Certiorari Within the Meaning of Rule 19 of the Supreme Court Rules Are Presented in This Case.

Rule 19 of the Supreme Court Rules provides in part as follows:

> "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor."

To satisfy the requirements of Supreme Court Rule 19, the issues presented must be of importance to the public as opposed to the parties and must present "a problem beyond the academic or episodic." *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955).

In the instant case the major thrust of petitioner's claim of professional malpractice is based on the alleged failure of respondents to discover and present the "loan defense" as set forth hereinabove. Petitioner alleges that assertion of said defense

would result in acquittal as a matter of law under South Dakota law. Thus, petitioner claims that the Eighth Circuit Court of Appeals "decided an important state question in conflict with applicable state law, and has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the trial court as to call for an exercise of the court's power of supervision." (Pet. at p. 2)

The fallaciousness of such claims becomes apparent when considered in light of the fact that the South Dakota courts have ruled repeatedly that the assertion of the "loan defense" did not and will not result in acquittal as a matter of law. The South Dakota courts have held that SDCL § 22-38-3 covers the acts of petitioner as proven by the evidence presented in his embezzlement trial. Thus, petitioner's claim that the Eighth Circuit Court of Appeals decided an important state question in conflict with state law is based on petitioner's view that not only the federal courts misapprehended South Dakota law, but that the South Dakota courts have done the same.

The issue of whether under the facts and circumstances proven in the Zick trial petitioner could be convicted of embezzlement under the provisions of SDCL § 22-38-3 is not an issue of public importance. The scope and definition of SDCL § 22-38-3 is a question of state law and has been decided by the South Dakota courts contrary to petitioner's view of what the law ought to be. The fact that the case involves a claim of professional malpractice is no automatic qualification for certiorari review and petitioner's claim that the Court of Appeals acted in deference to respondents and in disregard of justice is absurd. The ruling of the Court of Appeals is proper and the petition for writ of certiorari must be denied.

CONCLUSION

Based upon all of the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

JOHN M. COSTELLO

WILLIAM G. PORTER, and

EDWARD C. CARPENTER of
COSTELLO, PORTER, HILL, NELSON,
HEISTERKAMP & BUSHNELL
704 St. Joe Street, P.O. Box 290
Rapid City, South Dakota 57709
605-343-2410
Attorneys for Respondents

APPENDIX

APPENDIX "A"

Defendant's Exhibit A

State of South Dakota }
County of Brookings } ss

In Circuit Court Third Judicial Circuit

Morris B. Myers,
Petitioner,
vs.
State of South Dakota,
Defendant and Respondent.
} CIU 75-5076

Petition

(Post-Conviction)

Petitioner above-named, respectfully petitions the above-named court and represents as follows:

1. That on May 7, 1973, in proceedings held in the above-named court, petitioner was convicted upon jury verdict of the crime of embezzlement; that judgment and sentence thereon was rendered by the terms of which petitioner was sentenced to serve a term of two years in the South Dakota State Penitentiary;

2. Petitioner incorporates herein by this reference all papers, files, records and transcripts of testimony and court proceedings filed in the office of the clerk of the above-named court in said embezzlement proceedings;

3. That said judgment and sentence was imposed in violation of the Constitution and laws of the United States and of the State of South Dakota;

4. That in other proceedings instituted to enforce against petitioner a penalty or forfeiture, to-wit, the suspension or revocation of petitioner's license to practice law within the state of South Dakota, a hearing was held of and concerning the facts and circumstances identical to those upon which petitioner's conviction is based; that a true, correct, and complete transcript of said proceedings is hereunto annexed and by this reference incorporated herein; that at the time of said proceedings and prior thereto, and without petitioner's knowledge or the knowledge of petitioner's counsel thereat, petitioner was the subject of other proceedings including the said embezzlement investigation and prosecution at the time being conducted by the Attorney General of the State of South Dakota; that at or prior to said proceedings neither petitioner nor his said counsel was informed that petitioner was the subject of said embezzlement investigation and prosecution, and petitioner was not informed of his right to remain silent and of his privilege against self-incrimination; that petitioner testified in said proceedings and such evidence and testimony thus illegally obtained was thereafter introduced against petitioner at petitioner's trial upon said charge of embezzlement; that petitioner did not knowingly and voluntarily waive his constitutional rights and privileges at said proceeding.

5. That petitioner's indictment and trial upon said charge of embezzlement and delay thereof, were occasioned by the State of South Dakota intentionally and with purposeful and deliberate design for delay, with no legitimate reason, for the purpose of obtaining a tactical advantage over petitioner and of trapping petitioner, all to petitioner's prejudice in that, among other prejudices, by such ruse and deception on the part of the State of South Dakota as hereinabove described, petitioner

testified fully and completely at the said proceedings to suspend or revoke petitioner's license to practice law without being informed of his right to remain silent and of his privilege against self-incrimination, which right and privilege petitioner did not knowingly and voluntarily waive, and by reason whereof petitioner was deprived of the right to remain silent, the privilege against self-incrimination, and the right to counsel; and said trial was so infected with an absence of that fundamental fairness that is essential to the very concept of justice; and petitioner's ability to defend said charge of embezzlement was impaired.

6. That petitioner's counsel at said embezzlement trial failed to assert said defenses of denial of petitioner's constitutional and statutory rights and further failed to conduct reasonable and careful factual and legal investigations and inquiries with a view to developing matters of such defenses in order for them to have made informed decisions on petitioner's behalf at either the pleading stage or at trial which resulted in withdrawing such crucial defenses from petitioner's case and petitioner was thereby denied effective and adequate assistance of counsel.

7. By reason of the foregoing facts and allegations petitioner has been denied his right to a fair trial, due process and equal protection of the law, right to speedy trial, right to counsel, right to remain silent and privilege against self-incrimination, all as guaranteed by the Constitutions of the United States and of the State of South Dakota, and specifically the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

Wherefore, petitioner prays that judgment issue vacating and setting aside the said embezzlement conviction of May 7, 1973.

Dated this 11th day of August, 1975.

MORRIS B. MYERS

State of Utah
County of Salt Lake } ss.

Morris Myers, also known as Morris B. Myers, the petitioner in the within petition, being first duly sworn, on oath, states: That he is the petitioner named in the within and foregoing petition; that he has read the same and knows the contents thereof; that all of the facts stated therein are true and petitioner knows them to be true except as to those matters stated upon information and belief and as to those matters he believes them to be true.

MORRIS B. MYERS

Subscribed and sworn to before me this 11th day of August, 1975.

CAROLYN WILSON
Notary Public, Utah
Resident at Salt Lake City, Utah

APPENDIX "B"

(DEFENDANT'S EXHIBIT B)

Circuit Court of South Dakota
Third Judicial Circuit
Brookings, South Dakota 57006
Telephone (605) 692-7328

Chambers of
Lyle E. Cheever
Circuit Judge

Jerome B. Johnson
Court Reporter

April 1, 1976

Memorandum Opinion

Mr. Morris Myers
1395 Chandler Drive
Salt Lake City, Utah 84103

and

The Honorable William Janklow
Attorney General
State Capitol Building
Pierre, South Dakota 57501

Attention: Mr. Mettler

Re: Morris Myers, Plaintiff and Petitioner
vs.
State of South Dakota, Defendant and Respondent

Gentlemen:

The Petitioner was convicted of the crime of embezzlement on May 7, 1973, upon a verdict of a jury. He subsequently ap-

pealed this conviction to the Supreme Court of South Dakota and the conviction was upheld. The Petitioner was sentenced to serve two years in the State Penitentiary and after the Supreme Court affirmed the conviction, he was committed to the State Penitentiary and completed his sentence.

He has filed this proceedings under the post-conviction review, Chapter 23-52 SDCL 1967. In his Petition, he has alleged four (4) separate grounds for post-conviction relief which may be summarized as follows: (1) That the Judgment and Sentence was imposed in violation of the Constitution and laws of the United States and of the State of South Dakota. (2) That in another proceedings which was for the revocation of the Petitioner's license to practice law, a hearing was held concerning facts and circumstances identical to those upon which his criminal trial was based, and he has alleged that at the time of such hearing that neither he nor his attorneys knew that a criminal charge was being filed and that he took the witness stand in connection with such disbarment proceedings without a cautionary warning that he had the right to remain silent and that such testimony was used against him in the trial upon the criminal charge of embezzlement and that he did not knowingly and voluntarily waive his right and privileges in the disbarment proceedings. (3) That the delay in the trial of the embezzlement charge was effected by the State of South Dakota intentionally and purposely for the purpose of obtaining tactical advantage in trapping him and (4) That his counsel at the embezzlement trial failed to assert his constitutional and statutory rights and he was therefore denied adequate assistance of counsel in such trial.

An evidentiary hearing was scheduled on such Petition and heard by the Court on December 17 and 18, 1975. At the hearing, the Petitioner called the Honorable H. O. Lund, formerly a Circuit Judge, who presided at the trial and interrogated him concerning various phases of the trial, the evidence offered thereat, and the general conduct of the trial.

The Petitioner also took the witness stand and testified briefly. During the hearing, six exhibits were offered and received in evidence. Exhibit No. 1 being a letter from Judge George W. Wuest, the Referee who presided at the Petitioner's disbarment proceeding, scheduling the hearing for October 31, 1972. Exhibit No. 2 being a phone memorandum from Judge Wuest to Stan Siegel, one of the attorneys who represented Petitioner in the disbarment proceeding. Exhibit No. 3 being a stipulation entered into between the Petitioner and the Attorney General's office stipulating that Exhibit A and B, being two (2) United States Treasury Department regulation circulars, to be received in evidence and these were made a part of the file. Exhibit No. 4 being a check from Morris Myers to Jerry Robinson dated April 15, 1968, in the amount of Five Thousand Dollars ($5,000.00). Exhibit No. 5 being a transcript of the testimony offered in the disbarment proceedings and Exhibit No. 6 being an Order of the Supreme Court of the State of South Dakota, dated May 18, 1973, disbarring the Petitioner from practice of Law in the State of South Dakota.

Both parties have submitted Briefs, the last Brief having been received from the Petitioner on March 29, 1976. The Court has given consideration to the Briefs submitted by the parties hereto.

In connection with Point No. 1 of the Petition herein, basically it is the Petitioner's contention therein that the conviction was obtained without relevant evidence that the money involved came into his possession by virtue of an attorney-client relationship or that he converted or misappropriated the money. It is his contention that under the circumstances presented that the money came into his possession, not as an attorney, but as a borrower from the bank and that the Petitioner became a debtor of the bank and could not be guilty of embezzlement of money that belonged to him.

In the Appeal in this case, a report of which can be found in 220 NW 2d 535, one of the Assignments of Error raised

by the Defendant-Petitioner in that case was the following: "Does the record support the conviction of the Defendant of the act and intent necessary to constitute embezzlement?" In connection therewith, the Court, at Page 537, made the following statement:

> "The section defining the embezzlement charged here is covered by SDCL 22-38-3, and whether or not the acts of the Defendant were sufficient to come within the purview of that particular section is largely a fact question. Fact issues are peculiarly within the province of the jury. Here there were two different versions of those acts. The State gave its version and the Defendant gave his. It appears that the jury accepted that given by the State and rejected that given by the Defendant."

The Appellate Court decision at Page 327, summarizes the facts developed at the trial of the case and the Court feels that it would be repetitious for me to repeat them as set forth in that decision.

In post-conviction proceedings, the Petitioner has developed no new factual situation but has suggested in his Brief that as a matter of law he could not be held to be guilty of embezzlement under the facts given and testified to in the trial, even accepting the State's version. The position of a Judge in reviewing under post-conviction relief, is not entirely clear. This is a relatively new act, the ramifications of which have not been fully developed by decisions. Our Court, however, said that in the case of *State v. Roth* (1969, 84 SD 44, 166 NW 2d 564):

> "A post-conviction proceedings is not a re-trial by the Court of the issues which the jury determined, nor is it a substitute for remedy of direct review of the trial."

The Court fails to see where the Petitioner here has raised anything except an issue of law which was developed, both at the trial and on review by the Supreme Court. The purported issues

of law would depend entirely on what interpretations this Court would place on the evidence, as the Court said in the Appeal of this case. It is not a law issue. It is a fact issue that was decided by the jury against the Defendant and in the Appeal, the Court upheld the jury's decision and said that the conviction was justified by the facts. It is, therefore, the Court's opinion that the Defendant has failed to sustain the burden on Point No. 1 of his Petition.

As to Point No. 2 of the Petition, wherein he claimed that his rights to remain silent were violated by his testifying in the disbarment proceedings. It was originally the Petitioner's contention that the disbarment proceedings were instituted and the hearing held prior to the time that he was arraigned on the embezzlement charge. At the opening of the hearing on the post-conviction relief, he admitted that he had been arraigned approximately thirty days prior to the time of the evidentiary hearing on the disbarment proceedings and that prior to the evidentiary hearing that he had retained Mr. Joe Butler and Mr. Ellsworth Evans as attorneys to represent him in connection with such criminal proceedings. At the evidentiary hearing on the disbarment proceedings, he was represented by Mr. Warren W. May of Pierre, South Dakota, and Stanley E. Siegel of Aberdeen, South Dakota. During the course of the evidentiary hearing, the Defendant voluntarily took the witness stand and testified on his own behalf. He now contends that by testifying on his own behalf without being warned that he had the right to remain silent, violated his constitutional rights and that the evidence obtained from his testimony was used against him in the criminal proceedings.

A review of the record of the criminal proceedings, indicates that at one point and one point alone, was the record of the evidentiary hearing at the disbarment proceedings referred to in the trial. On cross-examination of the Defendant, after he had voluntarily taken the witness stand, he was asked by the prosecuting attorney whether or not a question had been asked

and whether or not he had given a particular answer. The question and answer were rather innocuous in their context. They were not incriminating of the Defendant and the Court fails to find that there was any error involved in permitting this to be done.

It appears that the Defendant has attempted in his Brief to distort the meaning of the Miranda Warning; that he has misconstrued it and attempted to apply it to the situation involved here.

Basically the thrust of the Miranda Warning is that any admissions or confessions which are obtained in an in-custody interrogation of a Defendant without advising him of his constitutional rights or his right to have an attorney present during the period of questioning shall not be admissible against him in a criminal matter. That is not the situation that we have involved here. The Defendant voluntarily took the witness stand in his own behalf in a civil proceedings involving the question of whether or not his license to practice Law should be revoked. He was not in custody. He was represented by two (2) able, competent counsel, although they were not the attorneys he had retained to represent him in the criminal matter. The Defendant, an attorney himself, one who had defended many criminal cases, was well aware of the fact that a criminal proceeding was pending against him arising out of similar facts. He testified concerning his version of the factual situation which ultimately resulted in his conviction for embezzlement. His testimony was no different than that he presented at the time of the criminal trial.

It is therefore my opinion that this contention on the part of the Defendant is completely without merit.

As to Point No. 3 in Plaintiff's Petition in which he contends that the delay in the prosecution of the criminal case resulted in an unfair advantage, the Court finds it difficult to believe

that where an indictment was handed down approximately the 1st of October of 1972, and the trial was held in May of 1973, that this is an unreasonable delay. Part of the delay was caused by the fact that the Defendant requested a Change of Venue from Brown County because of the fact that he contended that he could not obtain a fair trial and the venue was thereafter changed to Brookings County, and he was tried in the first Term of Court after such transfer. Actually, only approximately eight months elapsed from the time of his indictment to the time of his trial and conviction.

As to Point No. 4 being his contention that he was not adequately represented by counsel, I believe the Court can take judicial notice of the fact that Mr. Joe Butler and Mr. Ellsworth Evans are recognized in the State of South Dakota as being two very outstanding trial lawyers. During the evidence which was introduced during the course of the post-conviction relief, and in interrogating the Trial Judge, the Defendant attempted to bring out several areas in which he felt that the trial tactics on the part of his counsel had not been properly done and during his own testimony, he indicated that in many areas during the course of the trial that he had not been consulted concerning various matters, tactical and otherwise.

The mere fact that the Defendant may disagree with his counsel, is not sufficient to show that he did not have adequate representation. There is no other evidence, nothing in the record which would indicate that the attorneys did not vigorously defend the Defendant. The fact that their defense was not successful, certainly is no evidence of the fact that they did not adequately represent him during the course of the trial.

In conclusion, it is the Court's opinion that the Petitioner here has not estabiished any basis for relief under the post-conviction proceeding and the Petition is therefore denied.

The Office of the Attorney General may prepare and submit to the Court, Findings of Fact and Conclusions of Law in accord-

ance with this opinion, together with an Order denying the Petitioner's Petition.

The Court further feels that the Defendant has not demonstrated that there is any merit to any of his contentions and in accordance with the provisions of 23-52-16, the Court does not believe that there is any probable cause for a review of this proceedings by the Supreme Court of this State and the Court does hereby refuse to issue a Certificate of Probable Cause.

Very truly yours,

/s/ LYLE E. CHEEVER
Circuit Court Judge

LEC:jj

APPENDIX "C"

(Defendant's Exhibit C)

In the Supreme Court of the State of South Dakota

In the Matter of the Application of Morris B. Myers
for Certificate of Probable Cause

Order Denying Application for Certificate of Probable Cause

Application having been made to a Judge of the Supreme Court of South Dakota for issuance of a certificate of probable cause to review a final judgment of the Circuit Court of Brookings County, South Dakota, denying post-conviction relief to petitioner, Morris B. Myers, and it appearing

From all the records and files herein that petitioner was convicted of the crime of embezzlement on May 7, 1973, in the Circuit Court of Brookings County, and thereafter his appeal to the Supreme Court of South Dakota resulted in affirmance of the trial court judgment. The opinion of the Supreme Court is referred to and by such reference adopted herein as fully as if set forth at length. *State v. Myers*, 220 N.W.2d 535.

It further appearing that the basis of petitioner's application herein is that the State failed to introduce relevant evidence on any material element of the crime charged and failed to prove a prima facie case against petitioner which denied him due process of law under the Fifth and Fourteenth Amendments to the Constitution of the United States, and

The foregoing application File No. 11304 having been referred to Fred R. Winans, Justice of the Supreme Court of South Dakota, by the Chief Justice of said Court,

It appears to said Justice that petitioner's claim that he has been denied due process is based upon his allegations that at the termination of the State's presentation of its evidence there was a failure on the part of the State to establish each and every material element of the crime charged.

The petitioner states that the State failed to introduce enough relevant evidence to support his conviction and suggests that the Constitution mandates that if the State fails in this respect then the missing evidence cannot be supplied by the defendant himself. He also states or infers that if a motion for a directed verdict had been made at the end of the State's case-in-chief, the trial court would have had to grant it.

It appears to the referral Justice that the South Dakota cases definitely hold that it is not reversible error to fail to grant a motion for a directed verdict at the end of the State's case-in-chief on the grounds of insufficiency of evidence when that evidence is introduced later by the defendant. *State v. Olson*, 161 N.W.2d 858; *State v. Zemina*, 206 N.W.2d 819, 823. Review will be of the entire record. In *State v. Myers, supra*, assignments of error 1 and 4 set forth the following question: "Q. Does the record support the conviction of defendant of the act and intent necessary to constitute embezzlement?" And the holding of this Court was that it did. In the Myers case assignment 4 reads as follows: "The Court erred in denying the defendant's motion for a directed verdict of acquittal for all the reasons stated in the motion for directed verdict of acquittal made at the close of all of the evidence." The holding of this Court was "If Mrs. Zick was correct in her testimony, if the banker was correct in his, then the defendant was wrong in certain crucial aspects of his. There was at least a prima facie case made by the state 'and the jury, not the judge, ought to pass upon it.' "

It appearing further to the undersigned Justice that the application is entirely without merit, that the issues which petitioner presents were presented to the lower court at trial and to this court on appeal. Further, that the application is simply an attempt to relitigate what has already been litigated and decided by the circuit court and this court on appeal. It is, therefore,

Ordered that the application of the said Morris Myers for issuance of a certificate of probable cause fails for lack of an appealable issue and is hereby denied.

Dated at Pierre, South Dakota, this 14th day of May, 1976.

Fred R. Winans
Justice of the South Dakota
Supreme Court

Attest:

Lyman A. Melby
Clerk of the Supreme Court